(5)

No. 90-891

Supreme Court, U.S.
FILED
JUN 3 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

CHARLES WHITE, ET AL., PETITIONERS

v.

RAYMOND S. DANIEL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

KENNETH W. STARR
Solicitor General

JOHN R. DUNNE
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

ROGER CLEGG
Deputy Assistant Attorney General

CLIFFORD M. SLOAN
Assistant to the Solicitor General

DAVID K. FLYNN
THOMAS E. CHANDLER
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals erred in applying laches to bar an action under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, when the action was filed after the last election under the challenged districting plan and prior to probable redistricting as a result of the 1990 census.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	6
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Abate v. *Mundt*, 403 U.S. 182 (1971)	2
Brown v. *Thomson*, 462 U.S. 835 (1983)	2
City of Mobile v. *Bolden*, 446 U S. 55 (1980)	11
Cornetta v. *United States*, 851 F.2d 1372 (Fed. Cir. 1988)	9
Costello v. *United States*, 365 U.S. 265 (1961)	4, 8, 9
Czaplicki v. *The Hoegh Silvercloud*, 351 U.S. 525 (1956)	8
Dickinson v. *Indiana State Election Board*, No. 90-2489 (7th Cir. May 21, 1991)	7, 13
Dotson v. *City of Indianola*, 514 F. Supp. 397 (N.D. Miss. 1981)	10
EEOC v. *Dresser Industries, Inc.*, 668 F.2d 1199 (11th Cir. 1982)	11
Gardner v. *Panama R.R.*, 342 U.S. 29 (1951)	8
Garza v. *City of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), cert. denied, 111 S. Ct. 681 (1991)	6, 7, 8, 10
Jeffers v. *Clinton*, 730 F. Supp. 196 (E.D. Ark. 1989), appeal dismissed, 111 S. Ct. 1096 (1991)	8, 11, 12
Knox v. *Milwaukee County Bd. of Election Comm'rs*, 607 F. Supp. 1112 (E.D. Wis. 1985)	8, 11, 13
Maryland Citizens for a Representative General Assembly v. *Governor of Maryland*, 429 F.2d 606 (4th Cir. 1970)	13, 14
Reynolds v. *Sims*, 377 U.S. 533 (1964)	13
Simkins v. *Gressette*, 631 F.2d 287 (4th Cir. 1980)	13, 14
Smith v. *Clinton*, 687 F. Supp. 1310, subsequent decision, 687 F. Supp. 1361 (E.D. Ark.), aff'd mem., 488 U.S. 988 (1988)	8, 10, 11

Cases—Continued: Page

Thornburg v. *Gingles*, 478 U.S. 30 (1986) 3, 11
Waddell v. *Small Tube Products, Inc.*, 799 F.2d 69 (3d Cir. 1986) 9

Constitution and statutes:

U.S. Const.:
Amend. I 3
Amend. XIII 3
Amend. XIV 2, 3
Amend. XV 3
Va. Const. Art. VII, § 5 2
Voting Rights Act of 1965, 42 U.S.C. 1971 *et seq.*:
§ 2, 42 U.S.C. 1973 ..... 3, 6, 7, 8, 9, 10, 11
§ 2(a), 42 U.S.C. 1973(a) 10
§ 5, 42 U.S.C. 1973c 5
Va. Code Ann. § 15.1-37.5 (1989) 2

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-891

CHARLES WHITE, ET AL., PETITIONERS

v.

RAYMOND S. DANIEL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Brunswick County is a rural county in southern Virginia. It is governed by a five-member Board of Supervisors, elected every four years from single-member districts. Pet. App. 6. The most recent election for supervisors was conducted in 1987, and the next election will be conducted in the November 1991 general election. *Id.* at 12 & n.4.

The County's present election districts were adopted in 1971. According to the 1980 census, two of the districts had black populations greater than 65%, while two had black populations greater than 50%. The overall black population of the County was approximately 57.4%. In 1975, two black candidates were elected as supervisors. No other black supervisors have been elected since Reconstruction. Pet. App. 6-7, 22.

The County was not redistricted following the 1980 census. Although the County's population had dropped from 16,172 to 15,632 between 1970 and 1980, the Board concluded that, because the total population deviation among the districts was only 10%, redistricting was not necessary. Pet. App. 22.[1] As a result of the 1990 census, it is likely that the County will adopt a new redistricting plan prior to the next scheduled election in November 1991. *Id.* at 15 n.7 & 16-17.[2]

2. Petitioners are black voters in Brunswick County. In September 1988, petitioners brought this suit al-

---

[1] The figure representing "total population deviation" is calculated by adding the percent by which the most overrepresented district exceeds ideal size and the percentage by which the most underrepresented district exceeds ideal size. See generally *Abate* v. *Mundt*, 403 U.S. 182, 184 & n.1 (1971). This Court has held that, as a general matter, a total population deviation of less than 10% is insufficient to make out a prima facie case of discrimination under the Fourteenth Amendment. See *Brown* v. *Thomson*, 462 U.S. 835, 842-843 (1983).

[2] Pursuant to Virginia law, counties are required to reapportion supervisor election districts following the decennial census. Va. Const. Art. VII, § 5; Va. Code Ann. § 15.1-37.5 (1989). The November 1991 general election will be conducted based on any redistricting required by the 1990 census figures. Pet. App. 15 n.7.

leging that the current method of electing members of the Board of Supervisors violated Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, as well as the First, Thirteenth, Fourteenth, and Fifteenth Amendments. They sought declaratory and injunctive relief, including special elections. The County's answer asserted, in part, that petitioners' claims were barred by the doctrine of laches. Pet. App. 5-7; Pet. 5.

The district court held a trial on the merits. At the close of petitioners' evidence, the court dismissed their constitutional claims for lack of evidence of intentional discrimination. Pet. App. 7. Following trial, the court held that the County's current system for election to the Board of Supervisors violated petitioners' rights under Section 2 of the Voting Rights Act. The court applied the framework set forth in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), and concluded that the election system "deprive[d] the black population of Brunswick County of an equal opportunity to participate in the political system and to elect representatives of their choice." Pet. App. 39.

The district court further concluded that, "to eradicate the inequality, the districting system in Brunswick County must be restructured to contain three districts with black population of 65% or greater." Pet. App. 39. Accordingly, the court ordered that the County "immediately restructure the election districts in Brunswick County to comply with plaintiffs' [submitted plan]." *Id.* at 41. The court added:

> This plan shall be used for candidates seeking to qualify for the 1991 election to the Board of Supervisors and shall be used for that election. If the 1990 census impacts upon this plan and necessitates redistricting, the district lines shall be adjusted to the minimum extent necessary and in accordance with this Memorandum Opin-

> ion. Any such revisions shall be subject to Court supervision.

Ibid. The district court did not address the application of laches in its decision, and declined to order special elections. See Pet. App. 17 n.9.

3. The court of appeals unanimously reversed. The court held that "plaintiffs' claims are untimely under the doctrine of laches," and that "the district court abused its discretion in failing to dismiss the case." Pet. App. 17. The court did not address the merits of the Section 2 claim.

In holding that petitioners' claim was barred by laches, the court of appeals examined the two elements of laches—"lack of diligence by the party against whom the defense is asserted" and "prejudice to the party asserting the defense." Pet. App. 10 (quoting *Costello* v. *United States*, 365 U.S. 265, 282 (1961)). With respect to lack of diligence, the court held that petitioners' delay was "inexcusable and unreasonable." Pet. App. 11. The court stated:

> The Board adopted the current districting plan in 1971, based on the 1970 census figures; after looking at the 1980 census results, the Board decided in 1981 to continue the 1971 plan with no changes whatsoever. However, the plaintiffs voiced no objection either to the 1971 redistricting or to the 1981 decision not to redistrict, and waited until September 1988 to file this action, seventeen years after the 1971 plan was adopted and months after the last election under the 1981 plan took place.

Id. at 11-12 (footnote omitted).

The court rejected petitioners' argument that the delay was justified because it provided them with

more elections from which to determine the existence of polarized voting. Pet. App. 12-13. The court stated that petitioners did not explain why election results from the 1970s and early 1980s were inadequate to support their claims. *Id.* at 12. The court concluded that petitioners, "in the exercise of reasonable diligence, could have discovered at a much earlier time the facts upon which they now base their claim. The analyses to support their allegation should have been conducted earlier and well before the last election to be held under the 1981 plan." *Id.* at 12-13.

The court next addressed the element of prejudice. The court stated that "a challenge to a reapportionment plan close to the time of a new census, which may require reapportionment, is not favored." Pet. App. 13. The court then noted that petitioners "did not file suit until September 1988, which was after the last election under the 1981 plan, and sixteen months before beginning the 1990 census, which may require reapportionment." *Id.* at 14-15. The court concluded that for two reasons the timing of petitioners' action was prejudicial. *Id.* at 15-16.

First, the court stated that the County would be prejudiced by having to reapportion itself now (as a result of the district court's order) and "probably" again after the 1990 census data is available. Pet. App. 15. The court stated that two reapportionments within a period of two years would create "instability and dislocation in the electoral system" and impose "great financial and logistical burdens," which would not be justified since there will be no election prior to the time the new census information may require a new districting plan. *Ibid.* Second, the court stated that the County would be prejudiced by having to reapportion with 1980 census figures,

which may no longer provide fair and accurate representation for the citizens of the County. *Id.* at 16.

The court concluded by stating that judicial relief at this time would "make[] no sense * * * [and] would be completely gratuitous, because there are no elections scheduled before November 1991 and the 1990 census figures may require reapportionment." Pet. App. 16-17.[3] See also *id.* at 15 n.7 (explaining that the 1990 census figures "will probably require reapportionment"). The court added that if the 1991 reapportionment violated the Voting Rights Act, petitioners could file a new action. *Id.* at 17.

The court of appeals denied petitioners' petition for rehearing and suggestion for rehearing en banc. Pet. App. 1-2.

DISCUSSION

Petitioners contend that laches cannot bar an action under Section 2 challenging an election practice or procedure, because a Section 2 violation is continuing in nature. Pet. 10-17. They also argue that even if the doctrine of laches is applicable, the court of appeals erred in finding inexcusable delay on their part and prejudice to the respondents. Pet. 18-20. Finally, they argue that the court of appeals' decision conflicts with the Ninth Circuit's decision in *Garza* v. *City of Los Angeles*, 918 F.2d 763 (1990), cert. denied, 111 S. Ct. 681 (1991). Pet. 21-22.

We doubt that the principle of laches should, as a general matter, bar a Section 2 action challenging election practices or procedures. But, in our view, the court of appeals' decision here does not warrant further review. First, there is no conflict among the

---

[3] The court noted that the district court had declined to order a special election and that petitioners had not appealed that ruling. Pet. App. 17 n.9.

circuits on the specific fact-bound issue in this case. Although the Ninth Circuit in *Garza* found that laches did not bar a Section 2 action, there was, in *Garza*, at least one more election scheduled under the challenged plan—a critical factual distinction from the present case. Second, any legal error by the court of appeals in this case is necessarily not of great importance. While the court may have erred in finding that the action was barred by laches, the court was entitled to consider the same factors in determining whether the district court abused its discretion in fashioning its remedy, a determination that is largely fact-bound. For these reasons, the petition for a writ of certiorari should be denied.[4]

1. There is no conflict among the circuits on whether, as a general matter, laches is inapplicable to a Section 2 action because of the nature of such a claim; that issue simply has not been addressed. There is also no conflict among the circuits on the specific fact-bound issue presented in this case. In *Garza* v. *County of Los Angeles*, *supra*, the Ninth Circuit held that the Section 2 action was not barred by laches. But in *Garza*, unlike in the instant case, there was one more election scheduled under the challenged plan. 918 F.2d at 765.[5] The court also em-

---

[4] We also note that, if redistricting occurs as a result of the 1990 census and an election is held in November 1991 under the new districting plan, the case might be moot by the time this Court would render a decision.

[5] The Seventh Circuit recently held that laches did not bar a Section 2 challenge; in that case as well, another election was scheduled under the challenged plan at the time of the district court's decision. See *Dickinson* v. *Indiana State Election Board*, No. 90-2489 (May 21, 1991), slip op. 1-2, 4, 9-10. In other published Section 2 decisions hold-

phasized the ongoing nature of the violation, and that the injury to the Hispanics was "getting progressively worse" with each election. *Id.* at 772. The court did not address whether laches might bar the action if there were no more elections scheduled under the challenged scheme. Thus, the different results in *Garza* and the instant case turn largely on the facts; they do not conflict with respect to the legal standard applied. See *Czaplicki* v. *The Hoegh Silvercloud*, 351 U.S. 525, 533 (1956) (whether laches bars an action depends on the particular facts of the case).

2. Second, although we believe that the court of appeals may well have committed legal error in concluding that the action was barred by laches, the error is not of sufficient importance to warrant review by this Court.

a. At the outset, we question whether, as a general matter, laches may bar a Section 2 action challenging election practices or procedures. Laches is an equitable defense that, in appropriate circumstances, may bar stale claims. Proof of laches requires a showing of inexcusable delay in seeking a remedy and prejudice to the defendant. See, *e.g.*, *Gardner* v. *Panama R.R.*, 342 U.S. 29, 31 (1951) (per curiam); *Costello* v. *United States*, 365 U.S. 265, 282 (1961). Mere lapse of time does not constitute laches —"the delay must be unreasonable and unexcused."

---

ing that laches did not bar the action, there was also at least one more election scheduled under the challenged system. See *Jeffers* v. *Clinton*, 730 F. Supp. 196, 201-202 (E.D. Ark. 1989), appeal dismissed, 111 S. Ct. 1096 (1991); *Smith* v. *Clinton*, 687 F. Supp. 1310, 1312-1313 (E.D. Ark.), subsequent decision, 687 F. Supp. 1361 (E.D. Ark.), aff'd mem., 488 U.S. 988 (1988); *Knox* v. *Milwaukee County Bd. of Election Comm'rs*, 607 F. Supp. 1112, 1116-1118 (E.D. Wis. 1985).

Cornetta v. *United States*, 851 F.2d 1372, 1378 (Fed. Cir. 1988).

A Section 2 action can be brought by any affected voter within the relevant jurisdiction, and, if meritorious, will benefit many voters besides the named plaintiff. The focus of laches, however, is on the *plaintiff's* delay, not merely on the lapse of time from when a claim might have been brought. See, *e.g.*, *Costello* v. *United States*, 365 U.S. at 282 (laches requires proof of "lack of diligence by the party against whom the defense is asserted"); *Cornetta* v. *United States*, 851 F.2d at 1377-1378 (the first element of laches is whether delay by claimant was unreasonable); *Waddell* v. *Small Tube Products, Inc.*, 799 F.2d 69, 76 (3d Cir. 1986) ("laches entails an inquiry into whether the party is deserving of the court's relief"). Focusing exclusively on a particular plaintiff's delay, as laches requires, ignores the larger class of potential Section 2 beneficiaries, including, for instance, voters who have only recently moved into the jurisdiction or become eligible to vote. In view of the broader interests protected by Section 2, we believe that a finding of laches is rarely, if ever, an appropriate disposition of a Section 2 challenge.

The continuing nature of a Section 2 violation further suggests that the doctrine of laches usually should not apply to a Section 2 action. So long as candidates elected under a plan found to be discriminatory continue to hold office, the violation continues. At a minimum, where plaintiffs allege that elections under a particular districting system result in an abridgement of their right to vote, there is potentially a new violation of the Voting Rights Act each time there is an election "applying" the

challenged system. See, *e.g.*, *Garza* v. *City of Los Angeles*, 918 F.2d at 772 (failure to file suit shortly after 1981 reapportionment did not constitute laches in part "[b]ecause of the ongoing nature of the violation"); *Smith* v. *Clinton*, 687 F. Supp. at 1312-1313 (action challenging apportionment plan not barred by laches in part because "the injury alleged * * * is continuing, suffered anew each time a State Representative election is held under the multimember structure"). Cf. *Dotson* v. *City of Indianola*, 514 F. Supp. 397, 401 (N.D. Miss. 1981) (laches does not bar action under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, because violation "arises anew each time the defendant enacts or seeks to administer an uncleared voting regulation").[6] In sum, the common law notion of laches should normally not bar a federal claim brought under Section 2.

b. We also have concerns about the way the court of appeals specifically applied laches in the instant case. In view of the continuing nature of the Section 2 violation, the reasonableness of petitioners' delay in filing should be measured from the last election (1987), not from when the districting plan was adopted (1971).[7] Moreover, the timeliness of peti-

---

[6] Section 2 provides in relevant part that no voting practice or procedure shall be "imposed or *applied*" in a manner which results in a denial or abridgement of the right to vote. 42 U.S.C. 1973(a) (emphasis added). The repeated nature of a Section 2 violation will normally further militate against a finding that plaintiffs are seeking to assert a stale claim or that they inexcusably delayed in filing suit.

[7] Moreover, since the focus of laches is on the plaintiff's delay, not merely on the lapse of time from when a claim might have been brought (see page 9, *supra*), a court applying

tioners' action in this case should not be measured by a standard that might have required them to file suit before the existence of a cause of action under amended Section 2.[8] Cf. *Jeffers* v. *Clinton*, 730 F. Supp. at 202 (the time should begin running from the Supreme Court's decision in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), which set forth the elements of a vote dilution case under amended Section 2); *Smith* v. *Clinton*, 687 F. Supp. at 1313 (laches denied in part because of intervening 1982 amendment to Section 2 and the *Thornburg* decision).[9]

---

laches should inquire into whether the named plaintiff—not some hypothetical plaintiff—unreasonably delayed in bringing suit. In the instant case, the court made no such inquiry.

[8] In 1982, Congress amended Section 2 to make clear that it prohibited the use of any voting structure that results, based on the totality of the circumstances, in the abridgement of the right to vote. The amendment was in response to the plurality opinion in *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980), holding that a violation of Section 2 required a showing of discriminatory intent. See *Thornburg* v. *Gingles*, 478 U.S. at 35-36.

[9] In addition, we doubt that petitioners' delay caused the type of prejudice generally necessary for the application of laches. Cf. *EEOC* v. *Dresser Industries, Inc.*, 668 F.2d 1199, 1203 (11th Cir. 1982) (" 'Classic elements' of undue prejudice include unavailability of witnesses, changed personnel, and loss of pertinent records"). Respondents cannot complain of the burden of two redistrictings, since that consequence would generally follow from a meritorious Section 2 claim regardless of when petitioners filed suit. That burden would be a consequence of unlawful election structure, not of petitioners' delay in filing. See, *e.g.*, *Jeffers* v. *Clinton*, 730 F. Supp. at 203 ("the expense, trouble, and disruption [caused by court-ordered redistricting] are not a consequence of plaintiffs' delay in filing"); *Knox* v. *Milwaukee County Bd. of Election Comm'rs*, 607 F. Supp. at 1119 (the "supple-

c. Nevertheless, any legal error by the court of appeals in this case is not of great importance. Many of the factors that led the court of appeals to apply laches can and should be taken into account in the exercise of equitable discretion in fashioning an appropriate remedy should petitioners prevail. The fact that petitioners filed this action after the last election before possible redistricting—which led the court of appeals to conclude, in part, that respondents would be prejudiced by having to redistrict twice within two years—is more relevant to the district court's exercise of equitable discretion in fashioning a remedy if a violation is found, than to whether laches bars petitioners' claim altogether. See, *e.g.*, *Jeffers* v. *Clinton*, 730 F. Supp. at 203, 217 (court rejected the argument that laches barred plaintiffs' challenge to the reapportionment plan before addressing the merits of the claim and fashioning a remedy);

---

mental expenditure of time and resources * * * [in preparing a revised districting plan is] a necessary consequence of ensuring that the voting rights" of the residents are upheld). The prejudice that may be attributable to petitioners' delay is conducting the two redistrictings in close temporal proximity—"two reapportionments within a short period of two years." Pet. App. 15.

Further, the mere fact that the court-ordered redistricting plan would use 1980 census data that might be outdated does not mean that petitioners' delay in filing suit prejudiced the respondents. If a successful suit had been brought at any point earlier in the decade, the resulting redistricting plan would have been based on 1980 figures. By the end of the decade, such a redistricting plan would be no more accurate in comparison to actual population figures than a redistricting plan adopted at the end of the decade using 1980 data. See *Jeffers* v. *Clinton*, 730 F. Supp. at 203 (staleness of census data used for remedial plan does not constitute prejudice for purposes of laches).

Knox v. *Milwaukee County Bd. of Election Comm'rs*, 607 F. Supp. at 1118 (action not sufficiently untimely and alleged prejudice not "sufficiently meritorious to justify outright dismissal").[10] Indeed, this Court has recognized that in apportionment cases a court should time its relief "to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable * * * demands on a State," *Reynolds* v. *Sims*, 377 U.S. 533, 585 (1964), thereby underscoring that the question of relief is distinct from whether the cause of action should be permitted to go forward.[11]

---

[10] See also *Dickinson* v. *Indiana State Election Board*, slip op. 10. (although the bar of laches was not established, the pendency of reapportionment justified withholding injunctive relief).

[11] The court of appeals relied in part on its prior decisions in *Maryland Citizens for a Representative General Assembly* v. *Governor of Maryland*, 429 F.2d 606 (1970), and *Simkins* v. *Gressette*, 631 F.2d 287 (1980), and stated that these decisions "are relevant to the applicability of the doctrine of laches." Pet. App. 13-14 & n.6. Even if the decisions clearly supported the applicability of laches, that fact would not affect the cert-worthiness of this case. But we believe that these decisions are distinguishable, and that they are not inconsistent with the view that the timing of petitioners' action may be relevant to relief, but not to the viability of the cause of action itself. In *Maryland Citizens*, the court of appeals affirmed a single district court judge's dismissal of the action challenging an apportionment statute without convening a three-judge court, stating that a single judge need not convene a three-judge court where the complaint does not state "a substantial claim for injunctive relief." 429 F.2d at 611. The court concluded, in part, that injunctive relief was unavailable because the action was filed too close to the next election to permit, if plaintiffs were successful,

Even if the court of appeals erred in applying the doctrine of laches, the court was entitled to consider the same factors in determining whether the district court abused its discretion in fashioning its remedy. The court of appeals might have concluded, for example, that in view of possible redistricting prior to the next election, the district court should have stayed its hand and not ordered immediate relief. Indeed, the court of appeals' conclusion (Pet. App. 17) that "[i]t makes far more sense to await" possible redistricting based on the 1990 census figures rather than to first adopt a court ordered plan implicitly recognizes that the timing of petitioners' filing affects the court's discretion in fashioning appropriate relief. Thus, the fact that the court applied the doctrine of laches, rather than considering the same underlying equitable factors in fashioning or withholding relief, is not of sufficient importance to warrant review.[12]

---

the adoption of satisfactory reapportionment plan without substantially disrupting the election process. *Id.* at 609-610. Similarly, in *Simkins*, the court upheld the dismissal of an apportionment challenge, filed two days before the opening of the filing period for candidates in the primary election, without convening a three-judge court. As an alternative ground for its decision, the court concluded that, because of the delay in filing, injunctive relief would not be available, and thus the plaintiffs had not stated a substantial claim warranting the convening of a three-judge court. 631 F.2d at 295-296. Thus, in both of these cases, unlike the instant case, there was no distinction between the claim and the remedy, and the unavailability of the latter barred the former. Neither case addressed laches.

[12] Because the court of appeals could have considered the same equitable factors in reviewing the remedy, moreover, petitioners' claim that the court of appeals' decision deprives

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JOHN R. DUNNE
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

ROGER CLEGG
Deputy Assistant Attorney General

CLIFFORD M. SLOAN
Assistant to the Solicitor General

DAVID K. FLYNN
THOMAS E. CHANDLER
Attorneys

JUNE 1991

---

them "of a nondiscriminatory benchmark for measuring retrogression of any new plan submitted for § 5 preclearance" (Pet. 17) is similarly unavailing.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 20576